Filed 2/7/19 P. v. Duran-Ortiz CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROSARIO MARIANA DURAN-ORTIZ, Defendant and Appellant.	A149960 (San Mateo County Super. Ct. No. NF436930)

Appellant Rosario Mariana Duran-Ortiz (Duran-Ortiz) was convicted of two felony counts of driving under the influence of alcohol with three prior DUIs, one felony count of driving with a blood-alcohol content of .08 percent or higher with three prior DUIs, five misdemeanors for driving with a suspended license, and one infraction for driving with a blood alcohol content of .01 percent or higher while on DUI probation—all arising from drunk driving arrests in 2015 and 2016. After finding eleven sentencing enhancements to be true, the court sentenced Duran-Ortiz to six years in jail, followed by one year and eight months of mandatory supervision.

On appeal, Duran-Ortiz contends the court abused its discretion and denied her due process by refusing to sever the 2015 charges (counts 1–6) from the 2016 charges (counts 7–9), and by admitting evidence of an uncharged offense under Evidence Code section 1101, subdivision (b), to establish Duran-Ortiz's identity as the driver in the 2016 incident. She also contends that the court committed cumulative error and that her sentence constitutes cruel and/or unusual punishment. We affirm.

BACKGROUND

Duran-Ortiz was charged by information as follows: count 1—driving under the influence of alcohol, with an enhancement for three prior DUI convictions within 10 years (Veh. Code, [1] §§ 23152, subd. (a) & 23550); count 2—driving with a blood-alcohol content of .08 percent or greater with an enhancement for three prior DUI convictions within 10 years (§§ 23152, subd. (b) & 23550); counts 3 and 8—driving with a suspended license as a result of a conviction under section 23152 or 23153 (§ 14601.2, subd. (a)); counts 4 and 9—driving with a license suspended under sections 13353, 13353.1, and/or 13353.2 (§ 14601.5, subd. (a)); count 5—driving with a license suspended for a reason other than those listed in sections 14601, 14601.2 or 14601.5 (§ 14601.1, subd. (a)); count 6—driving with a blood-alcohol content of over .01 percent while on DUI probation (§ 23154, subd. (a)); and count 7—driving under the influence of alcohol (§ 23152, subd. (a)), with enhancements for three prior DUI convictions within 10 years (§ 23550), refusal to submit to a chemical test upon arrest (§ 23577, subd. (a)(5)), and committing a felony while on bail from her 2015 DUI felony (Pen. Code, § 12022.1). The information also alleged as enhancements certain prior convictions relating to driving without a valid license: three prior convictions under sections 14601.2 and 14601.5, for count 3; two prior convictions under sections 14601.2 and 14601.5, for counts 4, 5, and 9; and one prior conviction under section 14601.2, for count 8.

I. The Prosecution's Case

A. DUI on May 2, 2015 (Counts 1–6)

At approximately 8:10 p.m. on May 2, 2015, Sergeant Melinda Barry was on patrol in Daly City when a Buick driven by Duran-Ortiz sped by. After unsuccessfully sounding her airhorn to get Duran-Ortiz to slow down, Barry pulled behind the Buick and conducted a traffic stop. When Barry approached the Buick, she smelled alcohol on Duran-Ortiz. She noticed that Duran-Ortiz's eyes were watery and that she was speaking

[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

slowly. Duran-Ortiz acknowledged that she did not have a driver's license with her, and she said she was the designated driver because she had consumed the least amount of alcohol of all the people in the car. Barry detained Duran-Ortiz and summoned Officer Garrett McKenzie to investigate.

Duran-Ortiz told McKenzie she had consumed two margaritas. The results of Duran-Ortiz's field sobriety tests indicated she was intoxicated. Preliminary alcohol-screening tests showed her blood-alcohol content was .133 percent at 9:11 p.m. and .148 percent at 9:14 p.m. McKenzie arrested Duran-Ortiz for driving under the influence and driving with a suspended license. Duran-Ortiz submitted to a mandatory blood draw, which showed her blood-alcohol content was .13 percent at 10:25 p.m.

B. DUI on February 18, 2016 (Counts 7–9)

At about 3:30 a.m. on February 18, 2016, Officer Cameron Newton saw a Volkswagen Jetta stopped in the middle of a traffic lane in Daly City with its headlights on. Newton parked his car and saw Duran-Ortiz unconscious in the driver's seat with the car keys in the ignition and engine running. He knocked repeatedly on the driver's side window, but he had to open the car door and shake Duran-Ortiz awake. She appeared dazed, her eyes were bloodshot and watery, and her breath smelled of alcohol. With slurred speech, she asked, "whose car is this?" and "where are my friends at?" A records check showed Duran-Ortiz's driving privilege was suspended, and she was on probation. Duran-Ortiz admitted her license was suspended and complied with Newton's order to turn off the car and hand him the keys.

Within five minutes of finding Duran-Ortiz, Newton ordered her out of the car and observed that she could not walk a straight line. Duran-Ortiz denied having any physical impairments or health problems. She admitted taking seizure medication and stated she had taken her medication two hours earlier. She also said she had slept earlier from 3:30 p.m. to 10:30 p.m. She denied that she drove the car, and said it belonged to her boyfriend, Eduardo Sanchez. Newton testified that Duran-Ortiz told him that she had been at a bar and then went to a liquor store, she had been drinking from 11:00 p.m. to 2:45 a.m., she possibly drank Jameson (but did not recall how much), and she felt tipsy.

Newton had Duran-Ortiz perform field sobriety tests, starting with the horizontal gaze nystagmus test, which required her to follow Newton's finger with her eyes, without moving her head. Lack of smooth eye pursuit and eye jerking, known as nystagmus, are indicators of a person's intoxication, especially if nystagmus occurs before the eye reaches 45 degrees off center. In both eyes, Duran-Ortiz lacked smooth pursuit, had sustained distinct nystagmus, and nystagmus commenced prior to 45 degrees. Newton opined that a sober person would not have had these results. Duran-Ortiz failed other field sobriety tests involving balance, walking, and counting. Although she claimed the wind was blowing her over, there was only a mild breeze.

Duran-Ortiz refused to submit to a preliminary alcohol-screening test, although Newton advised her she was required to do so. Based on this refusal, his observations, and her failure of the field sobriety tests, Newton concluded Duran-Ortiz was intoxicated, and he arrested her for driving under the influence. At the police station, Duran-Ortiz refused to submit to a mandatory blood or breath test. She called her boyfriend twice from jail on the morning of her arrest and told him that she had been drunk, and that she drove his car, parked to go to the bathroom, and then fell asleep when she returned to the car.

At trial, Scott Rienhardt, a criminalist with the San Mateo County Sheriff's Office, testified about the effects of alcohol on people. He opined that almost all people are mentally impaired with a blood-alcohol content of .08 percent and some are impaired at lower levels. He testified regarding the reliability of the horizontal gaze nystagmus test and stated that lack of smooth eye pursuit, sustained nystagmus, and onset of nystagmus prior to 45 degrees indicate a person is intoxicated. With respect to Duran-Ortiz's 2016 horizontal gaze nystagmus test results, Reinhardt opined that she exhibited all three of these conditions, indicating she had been drinking.

A California Department of Motor Vehicles employee testified that Duran-Ortiz had never been issued a California driver's license, and her records reflected a DUI conviction in 2014 with a blood-alcohol content of .08 percent or higher and DUI probation in 2015 and 2016. On both May 2, 2015, and February 18, 2016, Duran-

Ortiz's driving privilege was suspended, and she had acknowledged notification of this suspension with the DMV.

II. The Defense

James Norris, an expert in forensic science and field sobriety tests, testified that five percent of the population have medical conditions that cause nystagmus. As to a person without these medical conditions, Norris testified that nystagmus indicates the person has been drinking but does not establish how much he or she consumed.

Duran-Ortiz testified regarding the February 18, 2016 incident only. She said her ex-boyfriend, Eduardo Rodriguez, drove the car that night. The two of them consumed drinks in a park, and they later argued about Sanchez (her current boyfriend) as Rodriguez drove her home. Rodriguez got out of the car and left, Duran-Ortiz moved to the driver's seat to flash the car's lights at him, and then the police came. Duran-Ortiz testified she did not tell police that Rodriguez had been driving and she lied in the jail call to her boyfriend about driving the car because she did not want her boyfriend to know she was with her ex-boyfriend.

On cross-examination, Duran-Ortiz testified that on the night of the incident, she drank only one high-speed alcoholic energy drink, but she admitted she told Officer Newton she felt tipsy. She explained that she moved to the driver's seat of the car to flash the car's headlights at Rodriguez after he left, and then she fell asleep. She denied the car's engine was running when Newton arrived and said the keys were in her pocket. She admitted that she refused blood-alcohol testing because she knew she was under the influence. She also acknowledged that she had not successfully performed the other field sobriety tests that she took that night, she was on probation, and she had been previously convicted of making a false police report. Finally, Duran-Ortiz acknowledged she never had a valid California driver's license, and she knew her driving privileges were suspended.

Duran-Ortiz's friend, Grizelda Perez, testified that someone picked up Duran-Ortiz at Perez's house between 9:30 and 10:00 p.m. on February 18, 2016.

III. The Conviction and Sentence

The jury convicted Duran-Ortiz of counts 1–5 and 7–9, and she waived her right to jury trial on all enhancements. Following a bench trial, the court convicted Duran-Ortiz of the infraction alleged in count 6 and found all the enhancements true. The court sentenced Duran-Ortiz to a total of six years in jail, followed by one year and eight months of mandatory supervision as follows: the aggravated term of three years on count 1; a consecutive eight-month term on count 7 (one-third the middle term of two years) with a consecutive two years for Penal Code section 12022.1's on-bail enhancement; consecutive terms of one year on misdemeanor counts 3 and 8; concurrent terms of one year on misdemeanor counts 4 and 9; and a concurrent term of six months on misdemeanor count 5.[2]

DISCUSSION

I. Denial of the Motion to Sever

Prior to trial, Duran-Ortiz moved to sever the 2015 charges (counts 1–6) from the 2016 charges (counts 7–9). The prosecution opposed the motion, arguing that evidence of the 2015 incident was cross-admissible to prove count 7's on-bail enhancement and to show Duran-Ortiz's knowledge of her suspended driving privileges in 2016.[3] The prosecution also argued that DMV records reflecting Duran-Ortiz's license status were admissible in connection with both the 2015 and 2016 charges. Duran-Ortiz argued that severance was required because the prosecution's case was strong for the 2015 charges but weak for the 2016 charges. The court denied the motion. On appeal, Duran-Ortiz contends the court's ruling constituted an abuse of discretion and violated her right to due process. We reject both contentions.

Duran-Ortiz concedes the statutory requirements for joinder under Penal Code section 954.1 were met, but she argues that the potential for prejudice compelled separate

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[2] The court stayed the sentence on count 2 pursuant to Penal Code section 654.

[3] At the time the court heard the severance motion, it had bifurcated trial on the prior conviction enhancements but not on the on-bail enhancement. The court later bifurcated trial on the on-bail enhancement after Duran-Ortiz waived her right to jury trial.

trials. Where the requirements for joinder are satisfied, a defendant can predicate error only on a clear showing of potential prejudice. (*People v. Scott* (2015) 61 Cal.4th 363, 395.) " '[T]he difficulty of showing prejudice from denial of severance is so great that courts almost invariably reject the claim of abuse of discretion.' " (*People v. Matson* (1974) 13 Cal.3d 35, 39, quotation omitted.) Because "consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.)

The trial court's ruling on a motion to sever is judged by the information available when the court hears the motion and is reviewed for abuse of discretion. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) The factors to be considered are (1) the cross-admissibility of the evidence; (2) whether some of the charges are likely to unusually inflame the jury; (3) whether a weak case has been joined with a strong case, so the evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense. (*Alcala*, *supra,* 43 Cal.4th at pp. 1220–1221.) If evidence underlying the offenses would be cross-admissible, that is normally sufficient on its own to dispel prejudice and justify a court's refusal to sever, although complete cross-admissibility is not required. (*Id.* at p. 1221.) Nonetheless, "even the complete absence of cross-admissibility does not, by itself, demonstrate prejudice from a failure to order a requested severance." (*Ibid*.)

Reviewing the relevant factors, the trial court did not abuse its discretion in denying Duran-Ortiz's motion to sever. With respect to cross-admissibility, the on-bail enhancement for count 7 had not been bifurcated at the time the court heard the severance motion, and evidence from the 2015 incident would have been cross-admissible on this enhancement as well as on counts 8 and 9 to show Duran-Ortiz's knowledge of her suspended driving privileges. Moreover, DMV records reflecting her license status would have been admissible in both cases.

No additional factors favored severance. No injuries occurred in either the 2015 or 2016 incident, and neither incident was likely to unusually inflame the jury. (See, e.g., *People v. Balderas* (1985) 41 Cal.3d 144, 174 [where charged crimes did not include

evidence of gang warfare or child molestation, "there was no charge or evidence particularly calculated to inflame or prejudice a jury"].) We reject Duran-Ortiz's argument that the 2016 charges were significantly weaker than the 2015 charges because strong testimony from the prosecution's expert and Officer Newton, plus Duran-Ortiz's jail-call admission, all pointed to her guilt in 2016. Finally, this is not a capital case.

We also reject the claim that Duran-Ortiz's due process rights were violated. We reverse a proper joinder on constitutional grounds only if the defendant "shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process." (*People v. Arias* (1996) 13 Cal.4th 92, 127.) " 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' " (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229–230.) Here, strong independent evidence established the prosecution's case for both the 2015 and 2016 offenses, and Duran-Ortiz has made no showing that this is one of those "rare and unusual occasions" in which gross unfairness occurred. (*Ibid.*; see also *People v. Sapp* (2003) 31 Cal.4th 240, 259–260 ["Having concluded that defendant suffered no prejudice from the joint trial of the three murder counts, we also reject his contention that the joint trial violated his due process rights"].)

II. Admission of the 2014 DUI to Establish Identity

The court allowed the prosecution to admit evidence of the following uncharged offense to prove Duran-Ortiz was the driver in the 2016 offense.

Slightly before 1:00 a.m. on January 23, 2014, California Highway Patrol officers saw a stopped car flashing its hazard lights in the middle traffic lane on the Bay Bridge. Duran-Ortiz sat alone in the driver's seat. By the time an officer approached the car, Duran-Ortiz had moved to the front passenger seat. Duran-Ortiz's eyes were red and watery, her speech was slurred, and the car's interior smelled like alcohol. She told the officers her brother had been driving, but he left to find gas when the car ran out. She then abandoned this story and conceded she drove the car until it ran out of gas. She was arrested and convicted of driving under the influence with a blood-alcohol content of greater than .08 percent.

Duran-Ortiz argues that admitting of evidence of this 2014 DUI was error because identity was not at issue in the 2016 incident, and the incidents do not share sufficiently distinctive features to support an inference of identity. She also argues admitting evidence of the 2014 DUI was unduly prejudicial and violated her right to due process. Although identity was at issue in the 2016 offense because the prosecution had to establish that Duran-Ortiz was the driver of the car, we agree that the 2014 incident did not share sufficiently distinctive characteristics with the 2016 incident to be admitted on this issue. Nonetheless, the error was harmless.

Evidence Code section 1101, subdivision (b) (1101(b)) provides an exception to the general rule that character evidence is inadmissible to prove a person's conduct on a particular occasion. Under 1101(b), evidence of uncharged crimes is admissible to prove, among other things, a perpetrator's identity if the charged and uncharged crimes are sufficiently similar to support a rational inference the same person committed both acts. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) For evidence of uncharged crimes to be admitted to show identity, the pattern and characteristics of the uncharged misconduct and the charged offense " 'must be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403, quoting 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801–803.) " ' "The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." [Citation.]' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003.) We review rulings under section 1101(b) for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

In *People v. Tackett* (2006) 144 Cal.App.4th 445 (*Tackett*), the court considered whether uncharged drunk-driving incidents were admissible to prove the identity of the perpetrator of felony drunk driving and vehicular manslaughter. In *Tackett*, a recklessly-driven truck sped through a red light and stop signs on a busy thoroughfare, hit a car, and killed two people. The defendant and his friend were thrown from the truck; both had blood-alcohol levels over .20 percent. To establish that his friend was the driver, the defendant sought to introduce evidence that his friend had been arrested twice for drunk

driving—once after almost hitting two people as he sped down a street and fishtailed while turning, and once after police saw him speeding and spinning his tires after stopping at a red light. (*Id.* at pp. 452–453.) Lamenting the pervasiveness of drunk driving, the court found the uncharged incidents were inadmissible to show identity under 1101(b) because they were not sufficiently similar to the charged offense, and their shared characteristics were not sufficiently distinctive to be like a "signature." (*Tackett,* at pp. 457–459.)

Tackett's reasoning is persuasive here. The uncharged and charged offenses share the similarities of drunk driving at night, but these similarities do not create a sufficiently distinctive signature. (*Tackett, supra,* 144 Cal.App.4th at pp. 457–458.) Further, although Duran-Ortiz was alone in cars stopped in the middle of traffic lanes in both incidents, the incidents' dissimilarities are significant. In 2016, police found Duran-Ortiz on a Daly City street around 3:30 a.m. unconscious in the driver's seat of a car with its headlights and engine on. In the 2014 incident, she ran out of gas and police found her on the Bay Bridge slightly before 1:00 a.m., awake in a car with its hazard lights flashing. Duran-Ortiz initially claimed someone else was driving in both incidents, but the fact that she denied committing a crime is not unique. Further, unlike in 2016, shortly after police found her in 2014, she admitted she drove. Because the incidents' shared characteristics were not sufficiently distinctive to imprint a criminal signature on both, admission of the 2014 DUI was error.[4]

But simply showing error is not enough. Erroneous admission of uncharged crimes evidence is harmless where it is not reasonably probable a jury would have reached a more favorable result without the error. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 716.) Further, the erroneous admission of evidence does not offend

[4] On appeal, Respondent argues evidence of the 2014 DUI was properly admitted to show a common plan or scheme. We need not address this argument because the record reflects the 2014 DUI was admitted only to show the identity of the driver in the 2016 incident. Were we to address it, we would be inclined to agree with *Tackett*'s observation that drunk driving is not generally the result of a common scheme or plan. (See *Tackett, supra,* 144 Cal.App.4th at p. 459.)

due process unless it is so prejudicial as to render the proceeding fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439 [absent fundamental unfairness, a court reviews claims of erroneous admission of evidence for harmless error].)

The error here was harmless and did not render the trial fundamentally unfair. Although the court admitted evidence regarding the 2014 DUI, other evidence of Duran-Ortiz's guilt in 2016 was overwhelming. Officer Newton found Duran-Ortiz alone and unconscious in the driver's seat of her boyfriend's car in the middle of the street with the car's engine and headlights on. When she awoke, she smelled like alcohol and exhibited physical signs of intoxication. She conceded she had been drinking for hours and felt tipsy. She failed all field sobriety tests and refused blood-alcohol testing because she knew she was under the influence. Finally, she also admitted in a jail call that she drove the car while drunk. On this record, admission of the uncharged DUI was harmless and did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

III. Cumulative Error

Duran-Ortiz contends the cumulative effect of the court's errors violated her due process rights to a fair trial under the United States and California Constitutions. In examining a cumulative error claim, the critical question is whether defendant received due process and a fair trial. (*People v. Cain* (1995) 10 Cal.4th 1, 82.) The only error Duran-Ortiz established was admission of evidence of the 2014 DUI, but as we have found, this evidence was minor compared to the entire record. Duran-Ortiz was "entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) The record reflects that Duran-Ortiz received a fair trial, so we reject her cumulative error claim.

IV. Cruel and/or Unusual Punishment

Duran-Ortiz's final argument is that her six-year jail sentence constitutes cruel and/or unusual punishment under article 1, section 17 of the California Constitution and the Eighth Amendment to the United States Constitution. Because she "failed to raise the

issue below, it is waived." (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Even had she raised the issue, she could not prevail. Successful challenges based on proportionality are extremely rare. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) To establish cruel or unusual punishment under the California Constitution, the defendant must show the sentence is " 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 478, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) Under *Lynch*, in evaluating whether a sentence is cruel or unusual, the court first makes a proportionality determination by looking at the nature of the offense, the nature of the offender, and the circumstances of the offense committed. (*Lynch*, *supra*, 8 Cal.3d at pp. 425–426.) Next, the court compares sentences imposed on other criminals in the same jurisdiction and those imposed for the same crime in other jurisdictions. (*Id.* at pp. 426–427.)

Duran-Ortiz focuses only on *Lynch*'s proportionality assessment, so we do the same.[5] In making this assessment, we consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 479.) In addition, we consider the defendant's "individual culpability as shown by such factors as his [or her] age, prior criminality, personal characteristics, and state of mind." (*Ibid*.)

Duran-Ortiz argues her sentence is disproportionate and constitutes punishment for alcoholism. We disagree. Duran-Ortiz was sentenced for two felony drunk-driving counts and five misdemeanors, with eleven recidivist sentencing enhancements—not for alcoholism. "Unquestionably, driving a motor vehicle while voluntarily under the influence of intoxicants is a serious offense." (*People v. Coronado* (1995) 12 Cal.4th

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[5] Duran-Ortiz does not make any showing on the second and third prongs of the *Lynch* analysis. As it is her burden to show that the punishment is cruel or unusual, we decline to address those prongs.

145, 161 (dis. opn. of Mosk, J.).) Duran-Ortiz's sentence falls within statutory parameters (§§ 14601.1, subd. (b)(2); 14601.2, subd. (d)(2), (g); 14601.5, subd. (d)(2); 23550, subd. (a); Pen. Code, §§ 1170, subd. (h), 12022.1, subd. (b)), and enhanced punishment for habitual offenders has long been recognized to be legitimate. (See *People v. Cline* (1998) 60 Cal.App.4th 1327, 1338.) Duran-Ortiz was 28 and 29 years old when she committed the charged offenses, she had at least three prior DUI convictions, she was on DUI probation, and she knew she could not drink and drive. Yet she continued to do both, willfully disregarding the potential consequences. We agree with the trial court's observation that it is miraculous she had yet to injure herself or another person. In these circumstances, Duran-Ortiz's sentence does not shock the conscience.

Nor can Duran-Ortiz succeed in arguing her sentence violates the Eighth Amendment, which " 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' " (*Ewing v. California* (2003) 538 U.S. 11, 23 (plur. opn. of O'Connor, J.).) "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (*Rummel v. Estelle* (1980) 445 U.S. 263, 272.) Considering her sentence, her criminal history, and cases such as *Rummel* upholding far harsher sentences for repeat offenders in non-capital cases, Duran-Ortiz's invocation of the Eighth Amendment fails. (See *Rummel*, *supra*, 445 U.S. at pp. 284–285 [upholding defendant's sentence to life imprisonment following his third nonviolent felony conviction under a Texas recidivist statutory scheme]; see also *Ewing v. California*, *supra*, 538 U.S. at p. 20 [upholding defendant's three strikes prison sentence of 25 years to life for grand theft of golf clubs where he had four prior felonies].)

DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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STREETER, ACTING P. J.

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TUCHER, J.